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No. 98-1771

IN THE

Supreme Court of the United States

BARBARA SKAGGS, a Guardian of the Person and Estate of Roy Skaggs, an incapacitated person,

Petitioner,

v.

OTIS ELEVATOR COMPANY, a New Jersey corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should a violation of the constitutional guarantee of trial by an impartial jury be presumed, and a new trial required, simply because a juror failed to admit participation in past lawsuits on *voir dire*, even though a post-trial evidentiary hearing disclosed no evidence of actual bias and no connection between the juror and the parties or the facts of the case?

STATEMENT PURSUANT TO RULE 29.6

Respondent Otis Elevator Company (Otis), a New Jersey corporation, is a wholly owned subsidiary of United Technologies Corporation (UTC).

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STATEMENT OF THE CASE

This petition for certiorari seeks a new trial on the basis of an allegedly dishonest answer given by a juror during *voir dire*. The underlying lawsuit was a negligence action brought by Petitioner Barbara Skaggs (Petitioner) to recover for injuries sustained by her husband Roy Skaggs (Skaggs) when he severed the hydraulic line of an Otis elevator, in a building where he was performing construction work, by dropping a large concrete block into the elevator shaft. Although it was undisputed Skaggs was severely injured, Petitioner's evidence of liability was extremely weak and the jury returned a verdict in favor of Respondent Otis Elevator Company (Otis) after only a few minutes of deliberation.

After receiving an adverse verdict, Petitioner searched court records and learned the jury foreman, Douglas Van Zandt, had filed bankruptcy and had been named in several lawsuits arising out of that bankruptcy. Van Zandt had failed to respond affirmatively to a general *voir dire* question asking whether the jurors or any family members had been a party or witness in a lawsuit. Petitioner filed a motion for new trial, or in the alternative, an evidentiary hearing. The request for evidentiary hearing was granted; after questioning of Van Zandt by counsel for both parties and the court, and review of the documents presented by Petitioner, the trial court found neither actual nor implied bias and denied the motion for new trial. This decision was affirmed by the Tenth Circuit, and Petitioner now seeks certiorari in this court.

While the Petition for Certiorari presents two questions for review, only the latter is legitimately at issue. It is

unnecessary to resolve the legal issue of whether the constitution guarantees an evidentiary hearing in every case in which implied bias is alleged, because it is undisputed a full evidentiary hearing was conducted in the instant case. Petitioner was given an opportunity to present the court records demonstrating past participation in lawsuits; the juror was subpoenaed and questioned by counsel for both parties and the court. A transcript of the evidentiary hearing is attached as Respondent's Supplemental Appendix (Supp. App.).

There is no suggestion counsel for Petitioner was limited or restricted in his efforts to demonstrate bias at the hearing. *See* Supp. App. at 23a, 25a, 30a. Petitioner makes no argument that a more in depth hearing would have demonstrated actual bias or any factual basis to imply bias. She concedes that the undisclosed bankruptcy and related lawsuits provide no basis for a challenge for cause. *See* Petition for Certiorari (Pet.) at 4. Petitioner instead asks this Court to set aside the objective, reasoned analysis of *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984) in favor of a rule that any omission on *voir dire*, if coupled with an unconvincing explanation for the omission at a subsequent evidentiary hearing, mandates a presumption the juror was biased against the losing party and therefore warrants a new trial.

The implied bias standard proposed by Petitioner permits post-trial disqualification of a juror for failure to disclose information which would not have supported a challenge for cause prior to trial; it also relieves the moving party of any burden of proving bias. Thus this standard would reward litigants who fail to make diligent pre-trial efforts to assess juror qualifications, experiences, opinions, beliefs or prejudices.

An overview of the facts and procedural history relevant to jury selection and the alleged juror bias is set forth below. As this summary illustrates, adoption of an implied bias rule broad enough to grant a new trial to Petitioner in this case would allow the losing party in almost every case to move for a new trial on the basis of potential juror bias. The burden to the judicial system which concerned this Court in *McDonough*, *see id.* at 553, would expand exponentially as every litigant received multiple trials in an futile quest to seat a "perfect" jury.

A. The Jury Selection Process

Petitioner sued Otis for negligence in the United States District Court for the Northern District of Oklahoma, and the case was placed on the July 1997 trial docket. Under the jury selection process in effect in the Northern District in 1997, jurors were summoned and qualified for jury service four times a year; once jurors were qualified in open court, a list of potential jurors was published by the court clerk's office and provided to counsel for any party upon request.[1] The list from which the jurors in the instant case were drawn was published on April 21, 1997, more than three months prior to trial; it contained 186 names, including Douglas Van Zandt.

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1. *See* Local Civil Rules of the United States District Court for the Northern District of Oklahoma, effective January 1, 1995, Rule 47.1 "Random Selection of Grand and Petit Jurors." The pertinent portion of this rule provides:

> *Until they have been qualified in open court*, the names of persons summoned for grand or petit jury service shall not be made public . . . (emphasis added).

On July 14, 1997, the trial court conducted *voir dire*, asking several questions of the prospective jurors as a group. The questions were whether any juror knew the attorneys, whether any juror knew the parties, whether any juror recognized the names on either party's witness list, whether any juror had served as a juror before, whether any juror or family member had participated in a lawsuit as a party or witness, whether any juror had a philosophical view that damages should be limited, whether any juror had been involved in a work related accident, whether any juror would have difficulty separating the issues of liability and damages, whether any juror had been stuck in an elevator, and whether any juror or family member had suffered substantial injuries as a result of an accident. No juror responded to the question regarding participation in a lawsuit. At the request of Petitioner's counsel, the trial court individually questioned one juror, the City Clerk of Catoosa, whether she had been involved as a witness in cases where the City was sued.

Fourteen potential jurors were seated in the jury box, and each side exercised three peremptory challenges. The remaining eight were seated as jurors.[2] After four days of trial, the case was submitted to the jury on July 17, 1997. As Petitioner notes, the jury returned a defense verdict after only a few minutes of deliberation.

B. The Post-Trial Allegations of Juror Bias

After receiving an adverse verdict, and presumably after concluding there was no reversible error in the trial record,

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2. Under Rule 48.1 of the Northern District Rules, civil juries can have anywhere from six to twelve members, unless the parties agree to less than six.

Petitioner began investigating the jurors' backgrounds. Through this investigation, Petitioner learned that juror Van Zandt had filed bankruptcy and had been sued by several creditors. Petitioner filed a motion for new trial, or in the alternative, request for an evidentiary hearing, arguing that juror Van Zandt's failure to answer honestly the *voir dire* question about participation in lawsuits concealed the juror's bias and thus denied Petitioner a fair trial. The request for an evidentiary hearing was granted.

The bankruptcy and other lawsuits presented in the motion for new trial were filed in 1995 and 1996. All were a matter of public record prior to trial and prior to publication of the list of prospective jurors in April of 1997. If jurors' past experiences with the judicial system was a matter of substantial concern to Petitioner, the list of potential jurors could have been requested from the court clerk and the same search of court documents which revealed Van Zandt's litigation history could have been conducted between April and July of 1997. By expending this effort, any suspected prejudice harbored by Van Zandt could have been negated with a peremptory challenge.

Reviewing the litigation history of 186 potential jurors undeniably costs a litigant more than investigating only the eight jurors finally seated; however, as this Court recognized in *McDonough*, invalidating a verdict after the fact "simply to recreate the peremptory challenge process" requires a greater investment of private and social resources than the system can be expected to give. *Id.* at 555. If a litigant is unwilling to accept anything less than a "perfect" trial, which *McDonough* recognizes is illusory, then he or she must expect to bear the additional costs of seeking perfection.

Even if Petitioner can be excused for delaying her investigation of the jurors' litigation history until jury selection was complete, she had an obligation to complete this investigation and present her concerns to the trial court before the case was submitted to the jury.[3] If the information presented in the motion for new trial had been brought to the trial court's attention prior to submission, the court could have, if it deemed it necessary to do so, dismissed Van Zandt and continued with seven jurors, thus avoiding the allegation of bias with no additional burden to the judicial system. In *McDonough,* this court recognized that if the information forming the basis of the request for new trial was known to counsel at the time of *voir dire*, but counsel chose not to question the juror further, then the respondents would be barred from later challenging the composition of the jury. *Id.* at 847, n.2. In the instant case, while Van Zandt's litigation history may not have been "known" to Petitioner prior to *voir dire*, it was available to counsel as a matter of public record.

C. The Evidentiary Hearing

Despite Petitioner's failure to investigate potential prejudice in a timely manner, the trial court granted Petitioner's request for an evidentiary hearing. Juror Van

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3. Otis is not conceding that a juror's participation in routine litigation such as bankruptcies and divorces will have any discernible effect on the juror's willingness or ability to serve as an impartial juror in a personal injury case. However, if Petitioner truly believes any juror who has had negative experiences within the legal system would have difficulty being fair to a plaintiff seeking substantial damages, then Petitioner should have investigated this potential prejudice as soon as possible rather than waiting to see whether the verdict would be favorable.

Zandt testified at the October 30, 1997 hearing pursuant to subpoena. Supp. App. at 2a. Petitioner's counsel was given an opportunity to question Van Zandt at length regarding the reasons for his omission on *voir dire*. Supp. App. at 3a-22a, 25a. Van Zandt explained he failed to respond to the question regarding participation in lawsuits because he was thinking of "lawsuits" in the context of someone being hurt, or suffering horrible damages, and did not realize his personal matters like bankruptcy or divorce were relevant. Supp. App. at 20a-21a.[4] The trial court refused to credit this explanation, finding Van Zandt was intentionally dishonest during *voir dire*. Supp. App. at 36a. However, the court recognized that dishonesty, standing alone, does not entitle a litigant to a new trial under *McDonough*. Supp. App. at 37a-38a. The court then considered whether the undisclosed information, the bankruptcy and other litigation, would support a challenge for cause and concluded it would not. Supp. App. at 36a-38a.

Although the trial court's application of the *McDonough* test was correct, it is important to note the court did not confine its analysis solely to *McDonough*. The court questioned Van Zandt regarding his omission and specifically probed the issue of whether Van Zandt's litigation history would interfere with his ability to be completely fair as a juror. App. C at 20a-21a; Supp. App. at 25a-29a. Thus, Petitioner received the opportunity to prove actual bias guaranteed by *Smith v. Phillips*, 455 U.S.

4. This explanation is similar to the explanation given by the juror in *McDonough*, that he did not understand the question about past accidents to apply to him because he did not consider the broken leg sustained by his son as a result of an exploding tire to be an injury resulting in prolonged pain and suffering. *See id.* at 551, n.3.

209 (1982). Finally, the trial court considered whether any facts existed from which bias could be presumed or inferred. App. C at 21a. Applying the standards for implied bias defined in Justice O'Connor's concurring opinion in *Smith,* the trial court found no basis to imply bias. App. C at 21a.

D. The Decision of the Tenth Circuit

The trial court's decision was affirmed by the Tenth Circuit on December 29, 1998. The Tenth Circuit agreed Petitioner had failed to satisfy the second prong of *McDonough,* because Van Zandt's litigation history would not have provided grounds for a challenge for cause. App. A at 8a. However, the Tenth Circuit did not conclude its analysis with *McDonough.* Instead, the court held that the advent of the *McDonough* test did not eliminate a litigant's broader historic right to prove actual or implied bias. App. A at 8a, citing *Gonzales v. Thomas*, 99 F.3d 978, 985-986 (10th Cir. 1996). Thus, the court stated:

> The movant who fails to prove the second prong of the *McDonough* test has necessarily failed to prove that the juror's actual or implied bias could have been established from the juror's correct response. Nevertheless, evidence of the juror's motive for intentionally providing an incorrect answer, or evidence of additional circumstances occurring outside the voir dire process, may demonstrate the juror's bias. In such unusual situations, a litigant should not be foreclosed from introducing evidence to demonstrate that the juror was biased and that the bias affected the litigant's right to a fair trial. App. A at 9a.

The Tenth Circuit recognized the district court is in the best position to observe the juror and make a first hand evaluation of his ability to be fair and noted that, while the district court found Van Zandt's explanation of why he failed to disclose his litigation history lacked credibility, the district court did not make any finding that Van Zandt's assertion he was not biased lacked credibility. App. A at 12a, citing *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1467 (10th Cir. 1994). This analysis is consistent with *Patton v. Yount*, 467 U.S. 1025, 1038-1039 (1984) (The determination of whether a juror's protestation of impartiality should be believed is essentially one of credibility, and therefore of demeanor, which the trial judge is best suited to determine.)

The Tenth Circuit rejected Petitioner's argument that the only reasonable explanation for Van Zandt's dishonesty was bias against Skaggs and a desire to influence the outcome of the trial. *See* App. A at 11a. The court held Petitioner had presented no evidence during the evidentiary hearing from which it could conclude that Van Zandt's reason for remaining silent during *voir dire* was to ensure himself a seat on the jury. App. A at 13a. The court recognized there are other equally plausible explanations for Van Zandt's silence during *voir dire*, such as embarrassment about his financial difficulties, and other plausible explanations for fabrication at the evidentiary hearing, such as embarrassment he had been caught in a lie during *voir dire*. App. A at 13a. This analysis is consistent with this Court's statement that "The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough* at 556. Given plausible explanations for the dishonest response which do not suggest impartiality,

the Tenth Circuit reasonably rejected Petitioner's request to drastically expand the law of implied bias by creating a presumption of bias any time a juror is caught in a lie. App. A at 13a.

REASONS FOR DENYING THE WRIT

The decision of the Tenth Circuit was not only reasonable, it was the only possible decision in accord with the rules governing juror bias established by this court in *McDonough* and *Smith.* The rule suggested by Petitioner eliminates the objective standard for identifying juror bias developed in *McDonough* and ignores the dictate of *Wainwright v. Witt*, 469 U.S. 412, 423 (1985) that the moving party must bear the burden of establishing juror bias. If this rule were adopted every trial would be subject to reversal, perhaps more than once. The fundamental, practical principles of finality and fairness would be sacrificed in pursuit of the "perfect" trial. This Court has long held that a litigant is entitled to a fair trial but not a perfect one, because there are no perfect trials. *McDonough* at 553, citing *Brown v. United States*, 411 U.S. 223, 231-232 (1973).

Reading the precedents of this Court in the light most favorable to Petitioner, the participation of a juror who lies on *voir dire* may require a new trial in three situations. First, a new trial may be warranted because an evidentiary hearing uncovers evidence of actual bias. *Smith* at 216. The trial court in the instant case, although showing no reluctance to characterize Van Zandt as untruthful, found no evidence of actual bias against Petitioner. *See* App. A at 12a. Petitioner argues that a pattern of lies prevents the district court from evaluating a juror's bias; *Smith* explicitly rejected a similar

argument that given the propensity for self-justification, a court cannot possibly ascertain impartiality by relying solely upon the testimony of the juror in question. *Smith* at 215.

Second, a new trial may be granted if a juror fails to honestly answer a question on *voir dire* and a correct answer would have provided a valid basis for a challenge for cause. *McDonough* at 556. Petitioner concedes the second prong of the *McDonough* test is not met, *see* Pet. at 4, but argues the *McDonough* test should apply only if the juror, who necessarily lied once to create a basis for a *McDonough* challenge, has a change of heart and offers a "rational and believable" explanation for the lie at a subsequent hearing. *See* Pet. at 9. Petitioner's protestations notwithstanding, the Tenth Circuit was correct in concluding that the rule proposed by Petitioner would inexorably eradicate the second prong of the *McDonough* test and would reduce the *McDonough* inquiry to the sole question of whether the juror's response was dishonest. *See* App. A at 12a-13a.

The wisdom of the *McDonough* standard is that it provides the trial court with an objective basis for a ruling regarding impartiality. The trial court is not required to determine a particular juror's internal motivation to lie on *voir dire*, but rather can assess the probability that bias was the reason for the lie based upon external, objective factors such as the juror's connection with the parties or experiences similar to the subject matter of the trial. Additionally, the *McDonough* standard ensures that a particular juror's fitness to serve on a particular jury will be consistently evaluated, whether challenged during *voir dire* or after a verdict is reached. In contrast, Petitioner's suggested standard of a presumption of implied bias whenever a juror lies "repeatedly" turns solely on the more subjective issue of

credibility. Many more verdicts would be set aside under such a standard because of speculation regarding the reason a juror omitted information on *voir dire*, while the really accomplished liars, who likely wield the most improper influence in the jury room, would have little difficulty persuading the court of their sincerity at an evidentiary hearing.

Finally, a new trial may be warranted when bias can be implied from the particular circumstances of the case. Implied bias differs from the *McDonough* test because it is not dependent on an incorrect *voir dire* answer; instead the issue is whether the juror's personal experiences would make impartiality impossible. Examples of the extreme situations justifying a finding of implied bias were outlined in Justice O'Connor's concurring opinion in *Smith*. These include situations where the juror is an employee of the prosecuting agency, a close relative of one of the participants in the trial, or a witness to the incident that is the subject of the trial. *Id.* at 222. Lower courts addressing claims of implied bias have often expanded the doctrine to include circumstances where there are similarities between the personal experiences of the juror and the issues being litigated. *See Gonzales* at 987; *Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir. 1992); *Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991); *Person v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988).

Whether the personal experiences of the juror are so similar to the facts of the case at trial that he or she can be presumed to be biased may be a close question in many cases, but it is not close in the instant case. The trial court found it clear from the evidence presented that Van Zandt was not previously involved in any action similar to the

personal injury action brought by Petitioner against Otis. App. C at 20a; Supp. App. at 37a. Petitioner does not present any link between Van Zandt's circumstances and the facts of Petitioner's case which would support a finding of implied bias under the above standard, arguing instead that bias should be presumed because it is difficult to ascertain exactly why Van Zandt lied.

In other words, Petitioner is asking the Court to relieve the losing party of any burden beyond proving that a juror lied about his or her reasons for giving an incorrect answer on *voir dire*. As this Court observed in *Dennis v. United States*, 339 U.S. 162, 168 (1950), "The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact." Maybe Van Zandt was embarrassed by his financial problems, maybe he was daydreaming during *voir dire* and lied to save face, maybe he wanted to sit on the jury to ensure a defense verdict; each of these explanations is pure speculation. If a losing party is relieved of the burden of proving bias, in favor of merely speculating it existed, many if not most verdicts will be subject to new trial.

Just as due process does not require a new trial every time a juror has been placed in a potentially compromising situation, *see Smith* at 217, due process does not require a new trial every time a juror who withholds information on *voir dire* gives an unconvincing explanation of the omission at a subsequent evidentiary hearing. Just as there are varied motives for a juror to conceal information during *voir dire,* there are motives besides bias or partiality for a juror to attempt to justify or conceal the omission at a subsequent evidentiary hearing. A discredited explanation of the omission made on *voir dire*, standing alone, without any

evidence of actual bias or any connection between the juror and either the parties or the facts of the case, does not warrant a presumption of implied bias. If that were the rule, to paraphrase *Smith*, few trials would be constitutionally acceptable.

Petitioner's reliance on *Clark v. United States*, 289 U.S. 1 (1933) is misplaced. The Court did not have to presume bias in *Clark*, as it is asked to do in this case. The evidentiary hearing produced direct evidence the juror first lied for the specific purpose of gaining a seat on the jury to press the case of her former employer and then forced a mistrial by holding out for acquittal without even listening to the reasons for conviction given by other jurors. *See id.* at 7-9. It was this attempt to use her place on the jury to obstruct justice, rather than the lie on *voir dire*, which supported the contempt conviction. *Id.* at 11. In the instant case, Petitioner lacks any evidence juror Van Zandt was motivated to lie in order to remain on the jury and argue in favor of a particular result. The crux of Petitioner's argument is that she should have no obligation to prove motive or bias, but is entitled to a presumption of bias merely by proving a juror lied. This argument is not supported by the facts of *Clark*; more importantly, it is precisely the argument rejected by this Court in *McDonough*.

Petitioner makes no argument that the decision of the Tenth Circuit is inconsistent with the analysis of *McDonough* and *Smith*. Instead, she asks this Court to grant certiorari on the basis of a perceived conflict with one decision of the Ninth Circuit, *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998). As the Court recognized in *Layne & Bowler Corporation v. Western Well Works, Inc.*, 43 S. Ct. 422, 423 (1923), certiorari should be granted only in cases

involving principles of public importance and where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. *Layne* dismissed a grant of certiorari in a patent case because, after careful review of the facts, it became clear that the decisions of the Ninth and Fifth Circuits were really in harmony rather than conflicting. *Id.* at 423.

At first glance, *Dyer* may appear to present such a broad right to new trial on the basis of juror dishonesty that reversal would be appropriate in the instant case, or indeed in any case where it appears a juror lied on *voir dire* about any issue and then and attempted to conceal or explain away the lie at a subsequent evidentiary hearing. Such analysis would conflict with not only the standards employed by the Tenth Circuit[5] but also with numerous prior decisions of the Ninth Circuit.[6] However, when the facts of *Dyer* are considered, the conflict all but disappears.

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5. *See Gonzales* at 987-989 (Doctrine of implied bias applies only in those extreme and exceptional cases where the juror has a personal connection to the parties or the circumstances of the trial or where similarities between the juror's experiences and the incident giving rise to trial would inherently create in a juror a substantial emotional involvement adversely affecting impartiality.); *Burton* at 1158-1159 (Juror involved in an abusive family situation, and struggling with fear and emotional distress because of that situation, should be presumed biased in a case where the defendant killed her husband and claimed she did so to protect herself and her children from continued abuse.)

6. *United States v. Plache*, 913 F.2d 1375, 1378 (9th Cir. 1990) (Doctrine of implied bias applies only in extreme and extraordinary cases presenting a relationship between the juror and the facts of the case with inherent potential for substantial emotional

(Cont'd)

The Petitioner in *Dyer* admitted taking four people hostage and shooting them, but pled diminished capacity. The juror in question answered no to the *voir dire* question "Have you or any of your relatives or close friends ever been the victim of any type of crime?" even though her brother had been pistol whipped and fatally shot in the back of the head. *Id.* at 972-973. When the dishonest *voir dire* answer was discovered during trial, the juror claimed she considered the death accidental. The trial judge was severely criticized by the Ninth Circuit for conducting an extremely cursory hearing lasting less than five minutes; the judge failed to review the case file of the brother's homicide, even though it was provided by the prosecutor, and failed to question the juror regarding her knowledge of the crime or how close she was to her brother. *Id.* at 974-978.

The facts of *Dyer* would have justified a new trial under traditional implied bias standards. Failure to admit the murder of a family member in a murder trial would clearly support a challenge for cause justifying reversal under the *McDonough* standard. The challenged juror was asked to decide the fate of a defendant who admitted committing

(Cont'd)
involvement adversely affecting impartiality.); *Tinsley v. Borg*, 895 F.2d 520 (Bias should not be presumed because juror in rape case failed to disclose that she had counseled rape victims in the context of her employment as a social worker.); *United States v. Allsup*, 566 F.2d 68, 71-72 (9th Cir. 1977) (Jurors in a trial for bank robbery who were employed at a different branch of the bank which was robbed should be presumed biased despite statements of impartiality on *voir dire* because their reasonable apprehension of violence created one of those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial.)

four homicides in a manner fairly similar to the manner in which the juror's own brother was killed. The juror herself had also been the victim of many burglaries, a kidnapping, and an attempted rape. *Id.* at 980. The majority, citing the Tenth Circuit decision of *Burton*, recognized that bias should be presumed only in rare cases. *Id.* at 984. Even the dissenting justices agreed that if the juror knew her brother's death was the result of a murder rather than an accident, she would have the necessary emotional involvement in the case to mandate a presumption of bias. *Id.* at 984, n.23.

Post-trial events in *Dyer* also made the juror's impartiality suspect; she later accepted employment with the California Department of Corrections, serving first as a guard on death row where Dyer was held, and later as a parole agent where she unlawfully reviewed Dyer's file to check the status of his appeal. *Id.* at 982, n.18. The juror did not testify in person at the evidentiary hearing before the federal court considering a writ of *habeas corpus*, because she evaded 21 separate attempts by the defendant to subpoena her. *Id.* at 981, n.16. Thus, the federal district judge did not have the same first-hand ability to assess the juror's credibility and demeanor as the court in the instant case. As this Court noted in *Patton*, the trial court's resolution of credibility questions is entitled to "special deference;" accordingly it will more often be necessary for an appellate court to presume bias when the challenged juror refuses to testify at an evidentiary hearing.

When the extraordinary facts of *Dyer* are considered, the Ninth Circuit's finding of implied bias is reasonably consistent with the precedents of this Court and the implied bias standards applied by other circuits. Therefore, there is no "real and embarrassing conflict of opinion" supporting

review under the *Layne* standard. If *Dyer* is given the much broader construction suggested by Petitioner, under which a new trial is required whenever a juror lies or omits information about any subject on *voir dire* and then offers an unconvincing reason for the omission at the evidentiary hearing, there is admittedly a conflict. However, if *Dyer* is given such a construction, the decision is, quite simply, an aberration. Review on certiorari will do nothing more than affirm that, regardless of Ninth Circuit language to the contrary, a new trial is warranted as a result of a dishonest *voir dire* response only where the incorrect answer would have supported a challenge for cause. As Justice Thomas recognized in his dissenting opinion in *Powell v. Nevada*, 511 U.S. 79, 87, it is a poor use of judicial resources to grant certiorari merely to reaffirm settled law.

CONCLUSION

Petitioner presents no compelling reason this Court should revisit the well-reasoned analysis of juror bias set forth in *McDonough* and *Smith*. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

RESPONDENT'S SUPPLEMENTAL APPENDIX — TRANSCRIPT OF EVIDENTIARY HEARING PROCEEDINGS DATED OCTOBER 30, 1997 AND FILED NOVEMBER 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 96-CV-605-H

BARBARA SKAGGS, individually and as Guardian of the Person and the Estate of Roy Skaggs, an incapacitated, person,

Plaintiff,

v.

OTIS ELEVATOR COMPANY, a New Jersey corporation,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON OCTOBER 30, 1997

EVIDENTIARY HEARING

BEFORE THE HONORABLE SVEN ERIK HOLMES, Judge

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[2] * * *

PROCEEDINGS

October 30, 1997

THE COURT: Please be seated. The Court calls the case of Skaggs, et al. vs. Otis Elevator Company. Could counsel please identify themselves for the record.

MR. LAIZURE: Yes, Your Honor, Tony Laizure for the plaintiff.

THE COURT: All right.

MR. MANCHESTER: May it please the Court, Robert Manchester and Shannon Emmons on behalf of defendant Otis Elevator Company.

THE COURT: All right. This matter come comes on pursuant to the plaintiff's motion for a new trial or in the alternative request for evidentiary hearing, in light of the apparent discrepancies between the statements made during the voir dire process and what appears to be at least a prima facie showing that one of the jurors, Mr. Douglas Van Zandt, had, in fact, been involved in certain litigation that was not brought [3] to light during the course of the voir dire.

Mr. Laizure, at this time you are recognized, sir. How do you intend to proceed?

MR. LAIZURE: Your Honor, I have subpoenaed Mr. Van Zandt, he is here in the courtroom, and I propose to call him as a witness and question him about some matters.

THE COURT: All right. Please proceed.

MR. LAIZURE: I would call Mr. Van Zandt to the stand.

THE COURT: Mr. Van Zandt, please come forward and be sworn.

Appendix

DOUGLAS THORNTON VAN ZANDT

Called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

THE COURT: Why don't we move the podium over here, if you would Mr. Maras and give Mr. Laizure more — Have a seat, sir.

All right, please proceed.

DIRECT EXAMINATION

BY MR. LAIZURE:

Q. Would you state your name please, sir?

A. Yes, my full name is Douglas Thornton Van Zandt.

Q. Okay. And where do you live, Mr. Van Zandt?

A. I live at Post Office Box 1, Talala, Oklahoma.

Q. And are you married?

[4] A. Yes, I am.

Q. What is your wife's name, please?

A. Sandra Van Zandt.

Q. Mr. Van Zandt, what is your present business or occupation?

A. I'm involved in art sales.

Q. And can you be more specific?

A. Yes. We present and sell in the sale of monumental bronze sculpture in regards to fund raising for most tax exempt nonprofit corporations.

Q. And who is the artist?

A. My wife is the artist.

MR. MANCHESTER: Your Honor, I don't believe the microphone is working for Mr. Laizure. I can hear the witness clearly but I'm not hearing what Mr. Laizure is saying.

MR. LAIZURE: I'll speak up.

THE COURT: All right, if you could, sir. Thank you. All right, without the benefit of the jury we can raise our volume at this time to take care of Mr. Manchester.

Go ahead, sir.

MR. LAIZURE: Thank you, Your Honor.

Q. (By Mr. Laizure) How long have you and your wife been in this kind of business Mr. Van Zandt?

A. Well, permanently about 12 to 15 years, sir.

Q. And prior to that time were you and her involved in it on [5] a temporary basis?

A. Basically myself part-time and her part-time, yes, sir.

Q. And for how long have you been in this business altogether?

A. Fifteen, 18 years. I don't know, about 1979, I think we kind of really kicked off into it.

Q. How old of a man are you, sir?

A. I'm 53. I will be 54 the 12th of November.

Q. And I believe when you were questioned or when you introduced yourself during the trial you told us a little bit about your educational background. Do you have a degree from the University of Texas?

A. Yes, sir, I do.

Q. And what is that degree in?

A. Business administration.

Q. And when did you obtain that degree?

A. 1971, sir.

Q. And do you have any postgraduate work?

A. Yes, sir, I do.

Q. What is that, sir?

A. It's in international business. I do not have a degree in that, but I have postgraduate work in both international transportation and marketing.

Q. Do you have military service?

A. Yes, sir, I do.

[6] Q. And what is that, sir?

A. I was 3 years 11 months and 89 days in the United States Marine Corps and served in Vietnam, sir.

Q. And what period of time would that entail, please?

A. 1963, March 18th, through 1967.

Q. And I believe you also referenced in your statement during jury selection that you have some international business experience with PepsiCo or Frito Lay?

A. I was of employee with Frito Lay. Yes, sir, I did work with PepsiCo, and then more recently than that with the Richards Group as the Director of International Services for an ad agency in Dallas.

Q. Tell me if you would, sir, please, your dates of employment for Frito Lay?

A. I was employed there upon graduation from the University of Texas, that would be 1971, July - August through 1975, December, I believe, sir.

Q. And in what capacity did you work for Frito Lay?

A. I was hired as a management trainee. I was a district sales manager in the Bronx, New York. I went from there as district sales manager in Little Falls, New Jersey, and then I went as a regional sales manager covering the east coast, and then on to be the manager what is called space management, space allocation in major department stores throughout the east coast, which spread from South Carolina, roughly, through the [7] eastern part of Canada.

Q. What were your dates of employment with PepsiCo?

A. Well, that was during that same period of time, sir. PepsiCo is the parent company to Frito Lay and I was assigned over there. I was still paid by Frito Lay but since I was in the Northeast and the corporate headquarters for PepsiCo is in Purchase, New York, I was attached over there for last portion of my employment, sir.

Q. Then when did this work for the Richards Group take place?

A. I believe I was there, sir, in '83 through '85. '83 through '85, yes, sir. And during that time I was responsible for the international services part of that company, sir. I was the director of international services.

Q. And when did you move to the State of Oklahoma?

A. 1985, sir.

Q. Prior to 1985 had you ever been involved in a lawsuit?

A. Not that I can remember, sir. Well, you know, now that all of this has been brought up and I read the testimony for retrial, yes, sir I was divorced, so I guess that was — I guess that was a lawsuit. I — I didn't realize that was. But, yes, I guess I was prior to 1985.

Q. And what testimony have you read?

A. Your — well, actually your — I don't know if it was testimony. I think it's your plaintiff's motion for new trial or hearing —

[8] Q. Okay.

A. — that was filed August the 14th, sir.

Q. Did you get that on your own?

A. No, sir, I didn't.

Q. Okay. Now, since 1985 have you been involved in any lawsuits?

A. Yes, sir, I have.

Q. And do you know how many?

A. No, not really. Many of which were dismissed, or whatever, but I have been involved in some, yes, sir.

Q. Okay.

A. I will say three or four lawsuits pertaining to business.

Q. Okay. Were you charged in 1988 with obtaining merchandise by bogus check in Rogers County?

A. To my knowledge, I'm not sure what that charge was. I never did go to court or anything like that. It was a situation where we were out of the country and we did pay for something and a check that we received was no good, and when we came back in we found out there had been a lawsuit filed against us. We immediately took care of that. So I never went to court or anything like that. It was something we didn't know about until we got back, sir.

Q. My question was, were you charged with a felony?

A. Obviously I was charged.

Q. All right, sir. Then have you been sued on occasion by [9] lawyers for legal fees?

A. As a result of a bankruptcy, yes, sir, they were — there were an attorney that did sue, sir.

Q. Okay. Were you sued, you and your wife sued by an attorney named Sandra Cole?

A. Yes, sir.

Q. And were you and your wife also sued by the Stratton Taylor law firm?

A. That's correct, sir.

Q. Okay. Are there any other law firms that have sued you for legal fees?

A. Not to — not to my knowledge, sir. They were part of the bankruptcy, sir.

Q. All right. Well, you were sued and judgment — were judgments rendered against you and your wife in both those cases?

A. Yes.

Q. All right. And you and your wife were also sued by John Baden, d/b/a Baden's Welding?

A. That's correct sir.

Q. And all of these lawsuits were filed in 1995 or 1996, were they not?

A. To the best of my knowledge, sir.

Q. Now, you did mention that you and your wife had filed bankruptcy; is that correct?

[10] A. That's affirmative, sir.

Q. Okay. I have placed some exhibits in front of you, Mr. Van Zandt. Could you find Plaintiff's Exhibit 5 which is Schedule F?

MR. LAIZURE: Actually, Your Honor, I've misnumbered. That should be Plaintiff's Exhibit 6 you are looking at and Plaintiff's Exhibit 5 is the last one in that group.

THE COURT: All right.

Q. (By Mr. Laizure) Is that the Creditors Holding Unsecured Nonpriority Schedule that you and your wife filed in your bankruptcy case?

A. Yes, sir, in the Chapter 7 bankruptcy case, that's correct, sir.

Q. All right, sir. And that bankruptcy case was filed here in the federal court in Tulsa sometime in —

A. October of '95 — '96, sir.

Q. Yes, September 30, 1996; is that correct?

A. That's correct, sir.

Q. All right. Now, in that Schedule F there are — there's Number 7 is a debt owed to Baden's Welding. And is that the same Baden that sued you and your wife?

A. That's correct, sir.

Q. And then Account Number 8 is the judgment that was rendered against you in favor of the Stratton Taylor law firm; is that correct?

[11] A. That's correct, sir.

Q. And Account Number 11 is a judgment rendered against you and your wife in favor of Claremore Welding Supply; is that correct?

A. That's correct, sir.

Q. Account Number 13 is a judgment in the amount of $45,756.73 against you and your wife in favor of an Edward Arrigoni?

A. Correct, sir.

Q. What was that related to?

A. It was failure — it was failure to deliver merchandise, sir.

Q. All right. And Account Number —

A. In a timely manner.

Q. Excuse me. Account Number 14 is a bill for legal services from the Head and Johnson law firm here in Tulsa?

A. That's correct, sir.

Q. Are they patent and trademark attorneys?

A. They are, sir.

Q. And Account Number 25 is the debt to Sandra Cole for legal services which had been reduced to judgment by the time you had filed this, was it not?

A. That's correct, sir.

Q. All right. And then Account Number 26 judgment creditor of T-A-S-S, Inc. Can you tell me what that's about?

[12] A. That was some accounting services that was handled over in the bankruptcy.

Q. All right, sir.

A. All of these judgments and debts were because of a creditor forcing us to seek protection under the bankruptcy code, sir.

Q. All right. Now, as a result of that we see that in addition to the bankruptcy proceeding you and your wife have been involved in at least six lawsuits, at least what's listed on your schedule; is that correct?

A. Yes, sir, we have been. Nonappearance on most of them, sir.

Q. All right. Now, and then you filed for bankruptcy in September of 1996; is that correct?

A. Affirmative.

Q. And then you dismissed your bankruptcy in May of 1997, didn't you?

A. That's correct, sir.

Q. And why did you do that?

A. We did that because we felt as if we had some contracts pending that we could pay our creditors, and we wanted to do that, sir.

Q. Okay. Now, you were served, were you not, in December of 1996 or January of 1997 with a complaint that the trustee had filed against you and your wife?

[13] A. That is correct, sir.

Q. All right. And in that complaint there were allegations that you and your wife had concealed, removed and failed to disclose assets within year before the commencement of your bankruptcy; correct?

A. The allegations that were in that adversarial proceeding were so numerous. There was everything from — who knows what all was in there, so I'm sure that was in there.

Q. Well, it's Plaintiff's Exhibit 4 in front of you if you want to refresh your memory if you can't remember.

And you're right, sir, there were a number of allegations all of which have to do with fraud, concealment of assets, transfer of assets improperly, and numerous violations of the bankruptcy code; isn't that correct?

A. Yes, sir.

Q. And you were aware, were you not, at that time that the bankruptcy trustee was objecting to your seeking bankruptcy on the basis that you and your wife had allegedly committed numerous acts of fraud; correct?

A. I don't know if that's correct, sir. I would like to have opportunity for counsel if that's — in regard to this, since this case has been changed to a Chapter 13 bankruptcy, sir, and will not be heard until Monday, November the 4th.

Q. Okay.

A. All of those were dismissed, sir.

[14] Q. I understand that. Those were the allegations that were made by the bankruptcy trustee; correct?

A. And they were allegations, sir.

Q. Yes. And then in May of 1997 you and your wife dismissed your bankruptcy previously filed?

A. That's correct, sir, as I stated before.

Q. Now, when were you called to serve as a juror in this case?

A. I'm sorry, Mr. Laizure, I don't have that in front of me. I'm sure you do.

Q. Well, let me ask you this, first of all. How did you feel when you and your wife received notice that the bankruptcy trustee was accusing you and her of bankruptcy fraud?

A. I thought it was absurd.

Q. Were you angry about it?

A. Oh, no, no.

Q. No. And why did you think it was absurd?

A. Because none of the allegations were true. They were — he — all — he acted on hearsay and it was proven, sir.

Q. All right. Was there a trial?

A. No, sir.

Q. And did you ever give a deposition in the case?

A. No, sir, not to my knowledge, sir.

Q. All right. And how did you feel when the lawyers and other people had sued you and your wife for nonpayment of fees [15] and nondelivery of services and obtained judgments against you?

A. We had spoken with Stratton Taylor and with all of the law firms and all of the creditors with the exception of Mr. Baden. They understood what the situation was, but they had to proceed according to law in regards to those judgments. They know that, and we are — still work with them and, you know, I think they all — they realize that we were forced into this bankruptcy by the creditor John Baden.

Q. Okay. Well, my question was how does it make you feel when all of the lawsuits and judgments were rendered against you?

A. Well, I, you know, I again, I did everything that I could to dismiss that and pay them in full, which I certainly plan on doing, sir.

Q. Well, how did it make you feel?

A. I had already talked with them. It didn't make me feel any different at all. This is something that just had to be done in the course of the law, sir.

Q. Do you remember sitting here in the jury box while the judge was conducting his questioning of the potential jurors?

A. Yes, sir, I do.

Q. And do you remember the judge telling the panel that the jury service was a civic duty and a legal obligation?

A. Oh, yes, sir. Yes, sir.

Q. And that your office as a juror was one of extreme public [16] trust?

A. You betcha.

Q. And that the services that you jurors would perform would be essential to the administration of justice?

A. Yes, sir.

Q. And that as prospective jurors you would be questioned to determine your qualifications to serve in the case?

A. Yes, sir.

Q. And that the purpose of the questions was so the parties could obtain a fair trial?

A. That is correct, sir.

Q. And that it was necessary that you be given an oath to answer truthfully all questions asked about you — asked you about your qualifications to serve as jurors?

A. Yes, sir.

Q. And do you remember the judge telling you that it was important for you to answer the questions fully and truthfully?

A. Yes, sir.

Q. And do you remember the judge telling you that if for any reason you wanted to respond privately, that you could have the opportunity to come forward to the bench and give a response?

A. Well, yes, sir, I believe I — the reason I believe that is because someone did that, yes, sir.

Q. All right. And do you remember the judge asking the jurors as a whole if any of them, or members of their immediate [17] family, had ever participated in a lawsuit, either as a party or in some other capacity such as a witness?

A. Yes, sir, I do.

Q. And did you respond that you and your wife had participated in these lawsuits?

A. No, sir, I don't think I responded at all, sir.

Q. Okay. And could you tell the Court why you did not respond that you had participated in all of these lawsuits, including a bankruptcy proceeding that had just been discharged or dismissed two months before jury selection?

A. Well, Mr. Laizure, to be honest with you, I really didn't understand that question as it pertained to me. Now, the reason I didn't understand that question is because the term "lawsuits" was used. And you automatically have the mind-set when you walk into this court that someone has either been hurt, or run over by a car and there is going to be great damages and things like that. To be honest with you, I didn't even think about the bankruptcy or divorce or anything like that being a part of something like this that was so, you know, so horrible. One out of eight people have been a part of a bankruptcy, sir, and I don't think there's very many jurors that are not sitting up there that don't have some baggage. I can tell you that I — it didn't even occur to me. And I can also tell you that in no way possible did this bias me in any way with my decision or that jury's decision.

[18] Q. Did you think that if you had truthfully disclosed your participation in lawsuits, including one in which you were accused of bankruptcy fraud, that you would be removed from the jury panel?

A. No, sir I knew that I — like I said before, I didn't even think anything about the lawsuit, a bankruptcy or divorce or anything like that. I had been involved in both of them and I think other people up there had too.

Q. Are you saying that you don't know what a lawsuit is?

A. I didn't know say that, no, sir.

Q. All right, sir. Well, when the judge asked you if you had ever been involved in a lawsuit, are you saying that you didn't understand the question, sir?

A. I'm saying that I didn't understand it as it pertained to me, especially in the case of a bankruptcy or a divorce, sir, no, sir. I will tell you that, truthfully.

Q. Was there any reason why you didn't ask the Court to rephrase the question or tell the parties that you didn't understand what the question meant?

A. Well, no, I didn't think it had any relevance.

Q. Well, you had, in fact, been involved in six or seven lawsuits, had you not, sir?

A. Well, I don't know if there were that many, but whatever you say I will agree with.

Q. Okay. And you are telling me your reason for not telling [19] the judge that you had been involved in a lawsuit when he asked you that direct question is you didn't think the question pertained to you?

A. That's correct, I didn't feel as if bankruptcy, divorce or things is what we were looking at. As I said before, Mr. Laizure, we are of the mind-set when we come to the federal courthouse that there has been some horrible damage done, be it Oklahoma City bombing, someone run over by a truck, and death and dismemberment occur. I had no idea that my personal financial problems, of which were behind me, were

a part of this. You know, I really didn't. And, again, it certainly didn't have any basis on my decision.

Q. All right.

A. I served this court as I served my country, sir.

Q. Prior to coming in the courtroom did you have an idea as to what this — I guess you had an idea as to what this dispute was about since you had read the motion for new trial?

A. Oh, yes, after I had spoken with you and received — yes, sir.

Q. And how did you get the motion for new trial?

A. It was a part of the subpoena from — well, I believe, the law firm is called — well, it's Robert Manchester. It was delivered by Larry Upchurch who is, I guess, a private investigator.

Q. And did you speak with —

[20] A. I didn't get that from you.

Q. Okay. Did you speak with either Mr. Manchester or Ms. Emmons or any representative of their law firm?

A. I did speak with Mr. Manchester and Mrs. Emmons after I was served with this, and I read this, sure. And I would have called you, sir, if I would have known what this was

all about. I think you were somewhat evasive when I asked you what it was all about.

Q. Well —

A. I'm sure you don't have to give me this information, but anyway I thought it was deceptive on your behalf.

THE COURT: Mr. Van Zandt, could you respond just to the question please, sir.

THE WITNESS: I'm sorry, sir.

Q. (By Mr. Laizure) And what did you and Mr. Manchester and Ms. Emmons discuss about the proceedings that were going to be taking place today?

A. Basically he asked me if, if these — these problems that were in this retrial motion had any effect on my decision.

MR. LAIZURE: I believe that's all of the questions I have, Your Honor.

THE COURT: All right. Mr. Manchester, your witness.

MR. MANCHESTER: Thank you, Your Honor.

Appendix

CROSS-EXAMINATION

BY MR. MANCHESTER:

[21] Q. Mr. Van Zandt, so that the record is clear, your conversations with me were by telephone?

A. Correct, sir.

Q. And your conversations with Mr. Laizure were by telephone?

A. That's correct, sir.

Q. And you were furnished all of the pleadings by our office as they reflect or as they relate to this hearing here today?

A. That's correct, sir.

Q. All right. Now, I really have but one question for you so that it will be clear from the record, and I'm reading from Page 17 of the transcript on the voir dire examination and the question the judge asked you starting at line 5. "Have any of you-all or members of your immediate family ever participated in a lawsuit, either as a party or in some capacity such as a witness, anybody have experience in being parties or witnesses in a lawsuit?"

Now, that's the question as was asked by Judge Holmes. At the time that question was asked of you, are you telling this Court and jury you did not consider that in connection with the bankruptcy proceeding?

A. Mr. Manchester, I doubt very seriously if anyone in that jury box comes here without any baggage. I didn't even consider it.

Q. All right, sir.

MR. MANCHESTER: Pass the witness.

[22] THE COURT: Mr. Laizure, anything further, sir?

MR. LAIZURE: No, Your Honor.

THE COURT: All right. Let me if I could, Mr. Van Zandt ask you a couple of questions. You have in front of you, do you not, the plaintiff's motion here for new trial, or in the alternative request for evidentiary hearing?

THE WITNESS: Yes, sir, I do.

THE COURT: And beginning as listed on Page 1, Paragraph 1, are these, each of these numbered paragraphs identifying legal proceedings, some cases lawsuits, some cases extensions of existing proceedings, some cases, at least in the case of the filing by bogus check is not private litigation, are each of these six numbered paragraphs true and correct, sir?

THE WITNESS: To the best of my knowledge, sir, yes sir.

THE COURT: Okay. Now, Mr. Laizure, for the record, are there, in addition to these are there additional proceedings that you're —

MR. LAIZURE: Your Honor, the only ones that I would know of, and I would not know of them by case number, but they would be referred to in the Plaintiff's Exhibit 5 by the designation judgment creditor, which by definition would mean there would have had to have been a lawsuit and a judgment rendered against Mr. and Mrs. Van Zandt. And I went over each [23] one of them with him during my questioning.

THE COURT: Okay. So we believe that these six encompass the extent of the litigation, at least to the best of your knowledge, sir?

MR. LAIZURE: Well, actually there is on Plaintiff's Exhibit 5, Account Number or Paragraph Number 11, judgment by Claremore Welding Supply not listed in the motion; the judgment in favor of Mr. Arrigoni, Number 13 is not listed.

THE COURT: All right.

MR. LAIZURE: And the judgment Number 26 in favor of TASS, Inc. against them, Number 26 is not listed. So those three additional legal proceedings.

THE COURT: So we believe — that is Number 26. We believe that from your standpoint that constitutes the universe, at least for this purpose from your standpoint?

MR. LAIZURE: As far as —

THE COURT: From your standpoint. That's not dispositive.

MR. LAIZURE: Yes, Your Honor, as far as we are able to determine, yes.

THE COURT: All right. Mr. Van Zandt, you see those six paragraphs, you have heard him refer to three additional matters which you have identified as judgment creditors, one is Claremore Welding Supply, the second is Edward Arrigoni, and the third one is TASS, Inc., which totals nine different [24] matters. Are these — are you aware, other than those nine, of any other lawsuits —

THE WITNESS: No, sir.

THE COURT: — recognizing that lawsuits include any kind of legal filing wherein parties are identified and claims are made through judicial process?

THE WITNESS: No, sir, I am not aware of that. And, again, all of those individuals have been addressed. And our business and ourselves had to seek this protection. And every one of those people, including the attorneys, have been — understand our situation. They had to file, we understood that, and again we made reference to pay in full our debts, sir.

THE COURT: Okay. And with the exception of the matter which resulted in the filing for bogus check, with respect to the other eight, is it correct, sir, that all of these revolved around your bankruptcy, either the shortfalls that occurred in the filing of the bankruptcy itself, the shortfalls that occurred in connection with the bankruptcy, or the legal fees that were run up?

THE WITNESS: Yes, sir, they were all — that was — that has been our problem for the last two years, sir.

THE COURT: All right. Now putting yourself back to the point of the voir dire process. Mr. Laizure has focused in some degree upon what you were thinking when you failed to [25] respond to this question affirmatively, but recognizing now that these are considered for purposes of that question to, in fact, be lawsuits and within the four corners of that question, the question then becomes, is recognizing you have had these financial problems and that they have resulted in these kind of legal proceedings which, in fact, are lawsuits, as that term is commonly known, is there anything about those experiences that might interfere with your ability to be completely fair as a juror in that case or in any case?

THE WITNESS: None whatsoever, sir.

THE COURT: All right. Is there something about your experiences in dealing with the judicial process, whether by the process where you were out of town, or the filing of the bankruptcy suit, or the filing by various creditors of individual collection actions, anything about that that has caused you to have a particular opinion or view of the judicial process that might affect your ability to serve as a juror in any case?

THE WITNESS: None whatsoever, sir. Might I expand on that, Your Honor?

THE COURT: Certainly.

THE WITNESS: I was the one person, Mr. Laizure, that sought any type of indication that there may be a parcel of evidence against the big company. You've got to understand I was with big companies and I've seen them, I've been a part of [26] firing them right before they received their retirement. I don't like that. I've got more prejudice against large companies than anything. And I was the one person in this jury that did everything possible to see if there was anything that a judgment could be awarded to Mrs. Skaggs or to Roy Skaggs.

THE COURT: Mr. Van Zandt, let me. My focus of my question, as I tried to make clear, was not to open up the deliberative process, because analytically we don't reach such an opening of the deliberative process unless and until there becomes a basis to do so. My focus is putting yourself at the beginning of that process, and at the point of the voir dire, is to ascertain whether or not at that point in time whether there was anything about these legal proceedings that might affect your ability to serve as a juror on any case, not on in case in particular but on any case?

THE WITNESS: None whatsoever, sir.

THE COURT: Do you bring to that process a particular point of view as a result of these legal proceedings?

THE WITNESS: I did not bring any point of view to this proceeding as a result of anything that had happened to me in the past, sir.

THE COURT: All right. Mr. Laizure, anything further from this witness?

MR. LAIZURE: No, Your Honor.

THE COURT: All right.

[27] MR. MANCHESTER: No, Your Honor.

THE COURT: All right. The witness may step down.

All right, Mr. Laizure, anything further as far as evidence, sir?

MR. LAIZURE: No, Your Honor. Well, I would offer to introduce the Exhibits 1 through 5.

THE COURT: All right.

MR. MANCHESTER: No objection.

THE COURT: They will be admitted.

All right, Mr. Laizure, you are recognized, sir. Further argument on this issue.

MR. LAIZURE: Thank you, Your Honor.

Your Honor, I am really distressed and troubled over the proceedings today because I'm really caught in a predicament between the zealous representation of my client and saying some things that I would not ordinarily say, but I am bound by the Constitution and by the oath I took and by the code of ethics to zealously represent my client within the bounds of the law, and that's what I'm going to do today.

Quite frankly, I think Mr. Van Zandt is a liar. He is a highly educated man, he has a degree from the University of Texas, he has postgraduate work, he's worked for major corporations in the international field, and for him to come in here and say, after he has read the motion for new trial, that he didn't think that question pertained to him, or any of the numerous [28] lawsuits that had been filed against him and his wife, is not worthy of this Court's belief. I know it's not worthy of my belief; I hope it's not worthy of your belief. I believe that he deliberately failed to answer the question honestly when you asked him in voir dire, and I believe that he has further perpetuated his dishonesty up there on the witness stand. This is a man with a considerable litigation history who had just been in the few months prior to this lawsuit, been accused of several acts constituting bankruptcy fraud. And for him — and he has judgments against him by lawyers that have represented him. And for him to come in here and say that he brings to this Court a clean slate with no prejudice against one side or the other is just simply not worthy of belief. I think that under the facts of this case the Court is aware of what is required under McDonough and what's required under the Gonzalez case. I believe his blatant dishonesty conclusively proves actual and implied bias and that we are entitled to a new trial because we were not given a fair trial due to the dishonesty of this juror.

THE COURT: All right. Mr. Manchester.

MR. MANCHESTER: Thank you, Your Honor. May it please the Court reference was just made to McDonough. We might look at that United States Supreme Court decision

because I think the standard is quite clear. A party must first demonstrate that a juror failed to answer honestly a material question on [29] voir dire, and then further — further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of the trial.

I suggest to you, I suggest to this Court that there is no showing that the failure to answer that question — and I'm not at all convinced, in fact, I am convinced to the contrary as far as this witness' failure to disclose. The question was have any of you or any members of your immediate family ever participated in a lawsuit, either as a party or in some other capacity such as witnesses.

Now, it's not written here, but I have seen judges or heard judges, I should say, on numerous occasions, both in federal and state court, don't tell me about your divorces, don't tell me about your bankruptcy, I just want to get into lawsuits in which you are involved in this court. Now, as the Court is well aware —

THE COURT: So that cuts this list down to about six.

MR. MANCHESTER: I'm sorry, sir?

THE COURT: So that cuts this list down to six then.

MR. MANCHESTER: All right, sir. It is a list of lawsuits that were filed but —

THE COURT: Real live lawsuits; right?

MR. MANCHESTER: Real live lawsuit. But they are not [30] participated, I suggest to this Court, in the same manner that lawsuits such as the case that was tried before this Court in four days of July of this year, they are not handled in that same manner. We took numerous depositions, I wouldn't attempt to count, probably 25, maybe 30 depositions were taken in this case. Suits on open account. Classically the lawsuit is filed, the process is served and a default judgment is ultimately entered, I mean, that's the commercial practice the work starts after the judgment is entered in which the lawyer attempts to take whatever steps are necessary to collect it. And I do think it is —

THE COURT: So you are saying if Mr. Van Zandt was a lawyer he might have had a different view of the word "lawsuit," but he was not of course.

MR. MANCHESTER: Yes, sir —

THE COURT: I suspect --

MR. MANCHESTER: — I think if I'm served with process and I don't — I do not understand the mechanics of the judicial process, and I take that process and I give it to a lawyer, or I deliver the pleadings to a lawyer who is preparing a bankruptcy schedule, I see that as something as perceived as different.

THE COURT: Let me ask you this, Mr. Manchester.

MR. MANCHESTER: Yes, sir.

THE COURT: Without meaning to embarrass, have you [31] ever been sued?

MR. MANCHESTER: Have I been sued?

THE COURT: Yes

MR. MANCHESTER: Yes, sir.

THE COURT: Okay. Now, when you got that process with your name in the caption, particularly being a skilled and experienced attorney, as you are, you must say that you knew at that moment that you were a party to a lawsuit.

MR. MANCHESTER: Yes, sir, and I was party —

THE COURT: And you knew that both as a very able attorney but also as a human being, having been served with a piece of paper with your name on it, the kind of empty feeling that one gets being a party to a lawsuit, you knew at that moment that not only as a lawyer but as a person you felt that feeling; right?

MR. MANCHESTER: I knew that, sir.

THE COURT: Even if it was completely meritless and frivolous, it nevertheless accompanied with it that sense of certainty that this was something that's not going to go away, like somebody hitting your car in a parking lot.

MR. MANCHESTER: Yes, sir, and I knew that after graduating from law school and having, I think it was seven years in the practice of law at the time that occurred. The witness does not fall in that category. When I talked to the witness, as did Mr. Laizure, he said I was served a summons. [32] Obviously, we know it was a subpoena.

I don't think in fairness, and one thing that my ears locked in on that was said by Mr. Van Zandt, we all bring some baggage to the courtroom. The question, the critical question is, did this affect the outcome of this jury verdict?

THE COURT: Well, let me say this briefly, is that your argument is much better focused on McDonough Power Equipment, Inc. than on the question of whether or not the inquiry by the Court, have you ever been involved in a lawsuit —

MR. MANCHESTER: All right.

THE COURT: — should yield a factual recitation that looks something like the list.

MR. MANCHESTER: I will focus accordingly.

THE COURT: So, that is, if you are going to undertake to persuade me that he shouldn't know that he was involved in a lawsuit, then we may as well start picking a new jury.

MR. MANCHESTER: All right, sir. I would suggest —

THE COURT: All right. But that's not the issue, nor is it the law to which I'm bound.

I tell you we're going to do, we're going to take a five minute break and we will take it up in my conference room in five minutes. All right.

MR. MANCHESTER: Thank you, Your Honor.

(Recess).

[33] (The following proceedings were held in the conference room.)

THE COURT: Please be seated. Under McDonough Power Equipment, Inc. vs. Greenwood, 464 U.S. 548, 1984 case, the Supreme Court held that to obtain a new trial a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

The Court finds that indeed this was a material question, and I can assure you that the Court finds that he failed to answer it honestly. I'm not prepared to credit in any shape, manner or form the explanation proffered on the stand.

The second part, however, is that it would have provided a valid basis for a challenge for cause. And I have spent a good deal of time examining these different lawsuits as they exist, and it is certainly clear to me that at least with respect to what I saw on the list, originally it was five, now eight of

the nine, are all surrounding the same financial reversal which included in it the bankruptcy as well as falling late due on payment schedules, and then as a result of that being unable to pay.

I'm having grave difficulty finding that those kinds of suits would form the basis for a challenge for cause. In [34] looking at other applicable authorities it seems to me that the cornerstone of this kind of a claim is that there is something about the nature of the lawsuits that were not mentioned that in fact were related in some way to the subject matter of the lawsuit at issue. That is, specifically cases where the matter dealt in some way with physical confrontation or abuse and somebody had been the object of abuse. It's clearly material the failure to answer honestly. But related to the subject matter, the kind of thing that would have caused us to all come forward and talk about further additional questions that we wanted to know, and as a result, to form the basis of a claim for cause, knowing with a certainty that an individual member of the panel had been the object of a series of suits, particularly almost all of them around the same financial reversals, there is no articulable basis on that record that would form a challenge for cause. It appears to me that the thrust of the argument at this time is that now that we know he's a liar, that's a basis for cause. And the answer to that is the Supreme Court contemplates specifically that you reach the second prong of the analysis after having determined he was a liar or she was a liar. Indeed, it requires that you say that the juror failed to answer honestly a material question. So the Supreme Court itself contemplates you have already established that there had been intentional, material, dishonest response. The Supreme

Court doesn't stop there, nor [35] does our inquiry. We are, in fact, at that point. But that's not what forms the basis for dismissal for cause. What forms the basis for the purpose dismissal for cause is had he answered honestly, would that form the basis for dismissal for cause. And there is nothing that I see in an honest response, assuming a capability not yet demonstrated in this court, that you would have on that record been able to come forward and seek a for cause dismissal, or that you would have come forward and sought additional information, which we now have about those actions, and as a result seek a for cause dismissal. So not only on its face is it not a basis for for cause dismissal, but it also does not and has not led to information which, once acquired, would form the basis of a for cause dismissal. And on that grounds, I don't believe that it meets the McDonough Power Equipment requirement.

And I will say that the only reason for having this take place in the conference room is that there is nothing about this ruling, which is hereby ruled in favor of the defendant, there is nothing about this ruling that I felt that I wanted to say out there such that this prospective — or this juror would think that he did something, that there was a lack of merit in the motion. There is no lack of merit in the motion, and certainly insofar as anything that he would feel good about knowing. It is highly meritorious on the first prong. It is simply that the Supreme Court requires that once [36] you have made that, established that fact, that there still be more in order to gain a new trial. I just don't believe that the subject matter of these lawsuits forms the basis of a for cause, or even once you know everything there is to know about it forms the basis of a for cause.

I will note further that it certainly has occurred to me whether or not to refer this matter to the United States Attorney, recognizing that this was testimony under oath at the time of the voir dire process, and that's just a matter of further consideration by me, but to the extent that that consideration had been raised earlier in this process, he did nothing today to dispel my fe lings about it. But that's not — the law requires simply more than the dishonest, the failure to answer honestly a material question in voir dire, it clearly and unmistakably requires the second leg be satisfied, and I find these fact record in these cases and these responses here in this hearing, as well as a review of those cases, that it does not satisfy the second requirement. So the motion will be denied.

All right, anything further in this regard? Mr. Laizure, anything further, sir?

MR. LAIZURE: No, Your Honor.

THE COURT: All right. Mr. Manchester?

MR. MANCHESTER: No, Your Honor.

MR. MANCHESTER: Ms. Emmons?

[37] MS. EMMONS: No, Your Honor.

THE COURT: All right. We will have a written order prepared and on file here in the next, probably sometime next week to that effect.

MR. LAIZURE: Very well.

MR. MANCHESTER: Thank you, Your Honor.